No 272.

Brf. of Forster for Appt.

IN THE

Supreme Court of the United States.

Filed Feb. 1, 1899.

OCTOBER TERM, 1898.

No. 272.

THE RATON WATER WORKS COMPANY,
Appellant,

against

THE TOWN OF RATON,
Appellee.

APPELLANT'S BRIEF.

HENRY A. FORSTER,
Of Counsel for Appellant.

C. G. Burgoyne, Walker and Centre Streets, N. Y.

In the Supreme Court of the United States.

OCTOBER TERM, 1898.

No. 272.

THE RATON WATER WORKS COMPANY,
Appellant,

AGAINST

THE TOWN OF RATON,
Appellee.

Appellant's brief.

Appeal from a final decree of the Supreme Court of the Territory of New Mexico, which reversed a decree of the district court, in favor of the complainant, for the specific performance of a contract, and dismissed the bill. The dismissal was on the ground that as the part of the municipal ordinance which comprised the provision of the contract that was in question, was invalid, the obligation of the contract was not impaired by later ordinances, which in effect partly repealed it.

Certificate, p. 66.
Opinion, pp. 38-9, 50.

The Raton Water Works Company (hereafter called the Water Company) filed a bill against the Town of Raton (hereafter called the town) to compel the specific performance of a contract for the building of water works and the furnishing of water therefrom for municipal and private purposes, that was contained

in town ordinance No. 10, passed July 24, 1891 (Bill, pp. 1-12; Ordinance, pp. 18-24, 55-60, 67-72), which ordinance had been ratified and confirmed by a vote of the qualified electors of the town, and had been accepted by the Water Company (Bill, p. 1; Ans., p. 13; Findings, pp. 24, 60-1, 72-3); and also for an injunction to restrain certain breaches of the ordinance.

Acting under the ordinance, the Water Company built water works to supply the inhabitants of the town with water, including a reservoir with a capacity of 2,000,000 gallons of water, several miles of eight inch mains, and forty four hydrants, at an expense of $115,000. The town accepted the plant and leased forty-four hydrants from the Water Company (Bill, pp. 3-4; Acceptance, pp. 8-9; Ans., pp. 13-14; Findings, pp 26-7, 62-3, 75-6). The town agreed by the ordinance to pay a specified rent for each hydrant for the term of twenty-five years (Ordinance, pp. 21, 58, 70), aggregating, $1,962.50 every six months (Bill, p. 4; Ans., p. 15; Findings, pp. 28, 65, 77) and "to "levy and collect a tax sufficient for the purpose of "making said semi-annual payments for each and "every one of the twenty five years aforesaid" (Ordinance, pp. 21, 58, 70).

On March 18, 1895, the town board of trustees enacted and passed "An Ordinance Relating to Tax Levy "and Appropriations for the Years 1895 and 1896" which appropriated "Amount due the Raton Water "Works Company, up to January 1st, 1895 $4,735.15 * * *

"Amount to pay water works Co., for fire hy-"drants, for the year commencing January 1st, A. D., "1895 $3,935." out of the revenue for the fiscal year commencing April 1, 1895 (Ordinance No. 59, pp. 9-10).

On May 23, 1895 (p. 5), the board of trustees enacted and passed a new ordinance entitled "An Ordinance "Relating to Tax Levy and Appropriations for the "Years 1895 and 1896," which omitted both appropriations for the payment of hydrant rent, and in place

thereof appropriated " To supply the town with water " $1,500 " (Ordinance No. 64, pp. 11-12).

In order to prevent any payments being made under ordinance No. 59, ordinance No. 64 provided:

" SEC. 8. Any moneys received or expended during the months of April and May, A. D., 1895, shall be included in the receipts and expenditures of the fiscal year commencing June 1st, 1895."

(Ordinance No. 64, p. 12.)

The effect of ordinance No. 64 is to repudiate $4,735.15 of hydrant rents for previous years as well as $2,435 of the rent for the then current year. The effect of putting back the commencement of the fiscal year by two months is to deprive the town treasurer of all power to pay warrants for over $4,400 of hydrant rents for previous years, that had been issued to the Water Company, but which were not payable until July 1, 1895, or later.

On and prior to March 18, 1895, the town board of trustees had issued to the Water Company the following warrants for hydrant rent.

No.	Date.	Amount.	When due.
536	Jany. 1 1895	$609.37	July 1 1895
537	Jany. 1 1895	500.	July 1 1895
538	Jany. 1 1895	609.38	Oct. 1 1895
539	Jany. 1 1895	500.	Oct. 1 1895
540	Jany. 1 1895	609.37	Jany. 1 1896
541	Jany. 1 1895	500.	Jany. 1 1896
542	Jany. 1 1895	609.38	Apr. 1 1896
543	Jany. 1 1895	500.	Apr. 1 1896
544	Mch. 18 1895	297.65	On demand
		$4,735.15	

(Bill, p. 5; Ans., p. 14. Findings, pp. 27-8, 64, 76).

After warrants Nos. 536 and 537 became due, they were presented to the town treasurer for registration, but he refused to register them (Bill, p. 6; Ans., p. 15).

On June 12, 1895, the board enacted and passed an ordinance providing:

"SECTION 1. That from and after the date of the passage and publication of this ordinance all the town warrants issued after June 1st, 1895, shall be received in payment of all town licenses."

(Ordinance No. 65, misprinted as No. 36, p. 12.)

The effect of this ordinance is to render ineffectual any mandamus to enforce the payment of the warrants by substituting scrip for lawful money of the United States in the fund out of which warrants are payable. By the laws of New Mexico, the Treasurer of a town is required to register each town warrant in the order in which it is presented, and to pay them out of the town funds accordingly.

New Mexico Compiled Laws, 1884, §§ 1649-1650.

The answer admitted the passage of ordinance No. 10; that it was ratified and confirmed by the qualified voters of the town; that it was accepted by the Water Company; that the Water Company complied with the ordinance and laid pipes, mains, fire hydrants and plugs as alleged in the bill; that the trustees of the town accepted the Water Company's plant (p. 13); that the Water Company had complied with and carried out the terms of the ordinance, and had prior to January 1, 1893, placed, constructed and erected forty four hydrants and had ever since maintained them for the use of the town; that the town has possessed and used them under and by virtue of the contract (p. 14); that the town had been and now is in the possession, use and enjoyment of the water plant of the complainant (p. 15); that the board of trustees of the town issued to the Water Company the warrants described in the bill (p. 14) for the payment of hydrant rents (Bill, p. 5); that warrants Nos. 536 and 537 were presented to the town treasurer for registration, after they became due, and were refused registration by the town treasurer (Ans., p. 15; Bill, p. 6); and that the

board of trustees of the town passed the various ordinances which the Water Company complained of (pp. 14–15).

The answer denied that ordinance No. 10 ,under which the water works were built, was or is valid and operative (p. 13) ; denied that under the ordinance and contract it was or is the duty of the town to pay the Water Company as rental for the forty four hydrants, the sum of $1,962.50 every six months (p. 14) ; denied that $1,962.50 became due to the Water Company every six months (p. 15) ; and specifically denied that it was or is the duty of the town under the contract or ordinance to levy and collect a tax sufficient to meet the semi annual obligations of $1,962.50 (Ans., p. 14) as provided in the ordinance (Ordinance, pp. 21, 58 ; Bill, p. 6).

The answer admitted that the town had given out that the contract, so far as it called for the payment of $1,962.50 semi annually, is inoperative and invalid, and further admitted that it had refused to pay the said sum of $1,962.50 semi annually ; that the cause of such refusal is that under the law of New Mexico the town is only authorized to collect a special tax to pay the water rents agreed to be paid to the Water Company to the extent of two mills on the dollar for any one year, and that under the law the town paid the Water Company each year the full proceeds of the two mill tax levy authorized by law for water rents (pp. 15-16).

The answer alleged that for the year 1891 the total assessment for town purposes was $628,940, that the town tax rate was five mills on the dollar and the taxes collected were only $2,089.52 ; that for the year 1892 the total assessment was $673,900, the tax rate was eight mills on the dollar and the taxes collected were $3,204.39 ; that for the year 1893 the total assessment was $807,230, the tax rate was six mills on the dollar, and the taxes collected were $2,718.83, and that for the year 1894 the total assessment was $650,620, the tax rate was ten mills on the dollar and the taxes collected were $3,616.52 (Ans., p. 16).

The answer also alleged that the warrants issued to the Water Company, in payment of hydrant rents (Bill, p. 5), were and are null and void, having been issued by the trustees of the town in excess of the amount derived from a two mills tax levy on each dollar of taxable property (Ans., p. 16); that ordinance No. 64 was and is valid and in full force (p. 17), and that ordinance No. 65 was and is valid and in full force and effect (p. 15).

The case was heard on the bill and answer (pp. 18, 67).

The district court (held by the Chief Justice of the Territory) decided that the contract contained in ordinance No. 10 was in all respects valid and awarded a decree for its specific performance by the town.

Findings, pp. 18–28, 67–77.
Decree, pp. 28–9, 77–8.

The town appealed to the territorial supreme court, which reversed the decree of the court below, and dismissed the bill (p. 30).

After the territorial supreme court had allowed the appeal to this court, it filed the statement of facts in the nature of a special verdict, which is required by § 2 of the Act of April 7, 1874 (18 U. S. Stat. at Large, p. 28), on appeals from territorial courts, in which it certified as follows:

"The court does certify that said ordinance" No 10, "so far as the same imposes upon the defendant the obligation to pay complainant an annual sum greater than the proceeds of a two mill tax levy or to impose a tax levy greater than said rate, was and is null, void, and inoperative, the same having been made and entered into by defendant's trustees in violation of law and in excess of powers conferred upon them by the statutes of New Mexico."

(p. 66.)

"and the court does certify that said warrants issued to complainants, as set forth in complainant's bill, were and are null and void, having been issued by the defendant's trustees in excess of the amount derived from a two mills levy on each dollar of taxable

property thus and having thus been issued contrary to law and in excess of the authority conferred by law upon said trustees."

(p. 66.)

"and the court does certify that * * * ordinance number 59" "was and is void and inoperative, and that ordinance number 64," "was and is valid and in full force."

(Certificate, p. 66.)

The opinion is to the same effect. The gist of it is contained in the two following paragraphs:

"We are now brought directly to the first question for determination: Had the trustees of the defendant town corporation the authority to enact ordinance No. 10 and enter into the contract in question, and thereby bind the defendant town to pay out of the revenues derived by taxation for the general purposes any sum in excess of that to be derived from a levy of two mills on the dollar on its taxable property for each year? We are of the opinion that the trustees did not have authority and power to so contract and bind defendant town in the manner as provided in said ordinance No. 10."

(pp. 38–9; 49 Pacific Reporter 902.)

"As the town has heretofore, it is undisputed, more than complied with its obligation by paying an amount in excess of what could have been derived from a two mills levy, and as ordinance No. 64 provides for the entire proceeds of a two mills levy being paid to complainant, it is apparent that its bill is without equity and should be dismissed."

(p. 50; 49 Pacific Reporter 909.)

The New Mexican statutes as to the powers of municipal corporations in force in 1891, when ordinance No. 10 was passed, are as follows.

Compiled Laws of New Mexico, 1884, provide:

"§ 1621. All municipal corporations organized under this act shall have the general powers and privileges, and be subjected to the rules and restrictions granted and provided in the sections of this act.

"Powers.

"§ 1622. The city council and board of trustees in towns shall have the following powers.

"FIRST—To control the finances and property of the corporation.

"SECOND—To appropriate money for corporate purposes only, and provide for payment of debts and expenses of the corporation.

"THIRD—To levy and collect taxes for general and special purposes on real and personal property.

"FOURTH—To fix the amount, terms, and manner of issuing and revoking licenses.

"FIFTH—To erect all needful buildings for the use of the city or town.

"SIXTH—To contract an indebtedness on behalf of the city, and upon the credit thereof by borrowing money or issuing the bonds of the city or town, for the following purposes, to wit: For the purpose of erecting public buildings; for the purpose of constructing sewers for the city or town; for the purpose of the purchase or construction of water works for fire and domestic purposes; for the purpose of the construction or purchase of a canal or canals, or some suitable system for supplying water for irrigation in the city or town; for the purpose of the construction or purchase of gas works for manufacturing illuminating gas, or purchasing illuminating gas; and for the purpose of supplying a temporary deficiency in the revenue for defraying the current expenses of the city or town. The total amount of indebtedness for all purposes shall not at any time exceed five per centum of the total assessed valuation of the taxable property in the city or town, except such debt as may be incurred in supplying the city or town with water and water works; and no loan for any purpose shall be made, except it be by ordinance, which shall be irrepealable until the indebtedness therein provided for shall be fully paid, specifying the purposes to which the funds to be raised shall be

applied, and providing for the levying of a tax not exceeding, *in total amount for the entire indebtedness of the city and town*, (excepting such debt as may be incurred in supplying the city or town with water or water works,) eight mills upon each dollar valuation of the taxable property within the city or town, sufficient to pay the annual interest and extinguish the principal for such debt within the time limited for the debt to run, which shall not be less than ten years nor more than thirty years, and providing that said tax, when collected, shall only be applied to the purpose in said ordinances specified, until the indebtedness shall be paid and discharged; but no such debt shall be created, except for supplying the city or town with water, unless the question of incurring the same shall, at a regular election of officers for the city, be submitted to a vote of such qualified electors of the city or town as shall in the next preceding year have paid a property tax therein, and a majority of those voting upon the question, by ballot deposited in a separate ballot box, shall vote in favor of creating such debt."

"SIXTY SEVENTH—They shall have power to erect water works, or gas works, or authorize the erection of the same by others; but no such works shall be erected or authorized until a majority of the voters of the city or town, voting on the question at a general or special election, by vote approve the same."

"SIXTY NINTH—When the right to build and operate such water and gas works is granted to private individuals or incorporated companies by said cities and towns, they may make such grants to inure for a term of not more than twenty-five years, and authorize such individuals or companies to charge and collect from each person supplied by them with water or gas, such water or gas rent as may be agreed upon between said persons or corporations so building said works and said city or town, and such cities or towns are authorized and empowered to enter into a contract with the individual or company constructing said works, to supply said city or town with water for fire purposes thereof,

and for such other purposes as may be necessary for the health and safety thereof, and also with gas, and to pay therefor such sum or sums as may be agreed upon between said contracting parties."

"SEVENTY FIRST—All cities and incorporated towns constructing such water or gas works are authorized to assess, from time to time, in such manner as they shall deem equitable, upon each tenement or other place supplied with water or gas, such water or gas rents as may be agreed upon by the council or trustees, or upon each vacant lot in front of which the pipes commonly called 'street mains' are laid, but such vacant lots as do not take water from such 'street mains' shall not be assessed more than one-half as much as may be assessed against the same amount of frontage of lots occupied by a one-story building; and gas should be charged for by the foot, and then only to such as use it; and at the regular time of levying taxes in each year, said city or town is hereby empowered to levy and cause to be collected, in addition to the other taxes authorized to be levied, a special tax on taxable property in said city or town, which tax, with the water or gas rent hereby authorized, shall be sufficient to pay the expenses of running, repairing, and operating such works; and if the right to build, maintain and operate such works is granted to private individuals or incorporated companies by such cities or towns, and said cities or towns shall contract with said individuals or companies for a supply of water or gas for any purpose, such city or town shall levy each year and cause to be collected a special tax, as provided for above, sufficient to pay off such water or gas rents so agreed to be paid to said individuals or company, or company constructing said works: *Provided*, however, that said last-mentioned tax shall not exceed the sum of two mills on the dollar for any one year."

"APPROPRIATIONS AND EXPENDITURES.

"§ 1636. The fiscal year of each city or town organized under this act shall commence on the first day of April in each year, or at such other time as may be fixed by ordinance. The city council of cities and board of trustees in towns shall, within the last quarter of each fiscal year, pass an ordinance to be termed the annual appropriation bill for the next fiscal year, in which such corporate authorities may appropriate such sum of money as may be deemed necessary to defray all expenses and liabilities of such corporation, and in such ordinance shall specify the objects and purposes for which such appropriations are made and the amounts appropriated for each object or purpose. No further appropriations shall be made at any other time within such fiscal year, unless the proposition to make each appropriation has been first sanctioned by a majority of the legal voters of such city or town, either by a petition signed by them, or at a general or special election duly called therefor. Nor shall the total amount appropriated exceed the probable amount of revenue that will be collected during the fiscal year."

"§ 1638. No contract shall be hereafter made by the city council or board of trustees, or any committee or member thereof, and no expense shall be incurred by any of the officers or departments of the corporation, whether the object of expenditure shall have been ordered by the city council or board of trustees or not, unless an appropriation shall have been previously made concerning such expense, except as herein otherwise expressly provided."

"§ 1649. Every treasurer of any incorporated city or town of this Territory shall have and keep in his office a book to be called the registry of city or town orders, wherein shall be entered and set down at the date of the presentation thereof, and without any interval or blank line between any such entry and the one preceding it, every city or town order, warrant, or

other certificate of such town or city indebtedness, at any time presented to such town or city treasurer for payment whether the same be paid at the time of presentation or not, the number and date of such order or certificate, the amount, the date of presentation, and the name of the person presenting the same, and the particular fund, if any, upon which the order is drawn. Every such registry of city or town orders shall be open at all seasonable hours to the inspection of any person desiring to inspect or examine the same.

"§ 1650. Every fund in the hands of any treasurer of any such city or town of this Territory for disbursement shall be paid out in the order in which the orders drawn thereon and payable out of the same shall be presented for payment."

"Limit of Taxation.

"§ 1724. No more than one per centum ad valorem shall ever be levied or collected, by any corporation organized under this act, upon the assessed value of the taxable property situate within the limits of such corporation for all purposes, and no indebtedness shall be incurred which will require any greater annual expenditure than said one per centum per annum will fully pay off and satisfy."

Assignment of Errors.

It is assigned for error that the Supreme Court of the Territory of New Mexico

1. Erred in reversing the decree of the District Court.

2. Erred in dismissing the bill.

3. Erred in finding that the board of trustees of the town of Raton did not have the power to contract and

bind the town in the manner provided by town ordinance No. 10, and thereby to bind the town to pay out of the revenue derived by taxation for general purposes, any sum in excess of the revenue to be derived from a levy of two mills on the dollar on its taxable property for each year.

4. Erred in finding that by reason of the provisions of paragraph 71 of section 1622 of the Compiled Laws of 1884 of the Territory of New Mexico, the trustees of the Town of Raton were limited, and were thereby inhibited from making and entering into the contract embodied in ordinance No. 10, and from thereby contracting to pay and from paying any greater sum of money than the sum derived by a special tax levy of two mills on the dollar during each fiscal year, upon the property subject to taxation within the corporate limits of the town of Raton.

5. Erred in deciding that the warrants issued to complainant are null and void.

6. Erred in deciding that ordinance No. 59 is void and inoperative.

7. Erred in deciding that ordinance No. 64 is valid and in full force.

8. Erred in not deciding that ordinance No. 64 is void as impairing the obligation of the contract contained in ordinance No. 10.

9. Erred in not deciding that ordinance No. 65 impairs the obligation of the contract contained in ordinance No. 10.

Points.

I. Ordinance No 10 created a contract by which the Water Company built a water works system for the use of the inhabitants of the town, and leased forty four hydrants to the town for the term of twenty five years, and the town agreed to pay hydrant rent at the rate of $1,962.50 every six months, and "to levy and collect a tax "sufficient for the purpose of making said "semi annual payments for each and every "one of the twenty five years aforesaid." The contract to pay the semi annual hydrant rent is one relating to the ordinary expenses of the town, and the rent agreed to be paid is payable out of the general revenues of the town among its other current expenses.

1. On July 24, 1891, the board of trustees of the town passed ordinance No 10 granting the Water Company an exclusive franchise to supply the town with water "for a term of twenty five years from the 15th day of "July, A. D. 1891." The ordinance named certain streets through which mains were to be laid, provided that the board of trustees should locate twenty five hydrants, and that the works should be capable of furnishing one million gallons of water a day, with a fire pressure of eighty pounds to the square inch on Fourth Street (pp. 19-24).

The parts of the ordinance material to this appeal are as follows:

"SEC. 4. Said Raton Water Works Company, its successors or assigns, shall lay and extend pipes for carrying said water to any part of the aforesaid town when requested so to do by the board of

trustees; *Provided*, persons owning property along the line of such proposed extensions shall take a reasonable amount of water, and *provided also*, there shall be ordered set in each street or lane by said trustees, on which said company or its assigns shall be required to lay pipe, one hydrant for every eight hundred feet of main pipe so laid or extension ordered * * *

"SEC. 10. In consideration of the benefits that will accrue to the town of Raton and its people, by the erection and operation of water works, and for the better protection of the town against fires, the town of Raton does hereby agree and bind the said town to rent from the said Raton Water Works Company or its assigns, for the aforesaid term of twenty-five years, twenty-five hydrants for the purpose of extinguishing fires and purposes pertaining to the fire department, flushing sewers, and irrigating public school grounds and parks, and the said town by the said board of trustees hereby agrees and binds the said town to pay to the said Raton Water Works Company or its assigns, at the rate of one hundred dollars per year for each of said twenty-five hydrants. That the said board of trustees further agree and bind the said town of Raton to pay said Raton Water Works Company or its assigns, the sum of seventy-five dollars per year for each hydrant for the next twenty-five additional hydrants that may be ordered set and erected by said board of trustees, and fifty dollars per year for each subsequent hydrant ordered set and erected thereafter by said board of trustees; *Provided*, the said Raton Water Works Company, or its assigns, shall erect and maintain, at all times, in good repair, double discharge fire hydrants with four-inch connections to the main pipe and two and one-half inch hose connections with each hydrant.

"SEC. 11. That the said town of Raton shall pay to the said Raton Water Works Company or its assigns, as follows, to wit: on the first day of January and July of each and every year one half of the aforesaid money and for all additional hydrants thereafter in like manner on the 1st day of January and July as aforesaid. The said town agrees to levy and collect a tax sufficient for the purpose of making said semi annual payments for each and every one of the twenty-five years aforesaid, and in default of making said payment the said town shall pay interest on said semi-annual payments at the rate of ten per cent per annum."

"SEC. 15. Within thirty days after the granting of this franchise, the said Raton Water Works Company shall file with the town recorder of said town, its acceptance in writing, of all the

terms, provisions and conditions of this ordinance, which acceptance, before filing, shall be duly acknowledged * * * *; *Provided*, the same shall be ratified by a vote of the people of this town as is hereinafter provided.

"SEC. 16. An election for the ratification or rejection of this ordinance shall be held in the town of Raton, at the hose house on the 1st day of August, A. D. 1891."

(pp. 20-3.)

The ordinance was ratified and confirmed by a vote of the qualified electors of the town and was accepted by the Water Company (Bill, p. 1; Ans., p. 13; Findings, pp. 24, 60-1, 72-3). The Water Company then built its works at an expense of $115,000; and located forty four hydrants in the places designated by the town. The town accepted the plant and leased the forty four hydrants from the Water Company, at a rent aggregating $1,962.50 every six months (Bill, pp. 3-4; Acceptance, pp. 8-9; Ans., pp. 13-15; Findings, pp. 26-8, 62-3, 65, 75-7).

The Water Company has ever since maintained the water works and hydrants for the use of the town, and the town has been and now is in the possession, use and enjoyment of the complainant's water plant and of the forty four hydrants, under and by virtue of the contract (Ans., pp. 14-5).

By these acts a contract was created which is protected by the Constitution of the United States from any municipal legislation impairing its obligations.

New Orleans Water Works Co. v. Rivers, 115 U. S., 674.
St. Tammany Water Works v. New Orleans Water Works, 120 U. S., 64.
Walla Walla v. Walla Walla Water Co., 172 U. S., 2, 9, 10.

2. The validity of ordinance No. 10 may be questioned on two grounds.

(*a*) The territorial Supreme court held that the town board of trustees had no power to enact ordinance No. 10, because the hydrant rent which it created was more than could be discharged by the two mills tax levy provided for by subdivision 71 of § 1622 of the

New Mexico Compiled Laws of 1884; and that ordinance No. 59 and the warrants issued to the complainant, are void (Opinion, pp. 38–9, 50; Certificate, p. 66).

(*b*) On this appeal it may also be claimed that ordinance No. 10 created an "indebtedness" within the meaning of the Harrison Act (24 U. S. Stat. at Large, p. 171) for the full amount of the stipulated hydrant rents, and is therefore partly invalidated by the provision of the Harrison Act which limits the indebtedness of territorial municipalities to four per cent. of the taxable property within their limits.

Neither of these objections is well taken.

3. After the semi-annual hydrant rents have been earned, they are a part of the ordinary expenses of the town as fully as any other of its unpaid current expenses, and for any balance remaining due on account of principal or interest after the application thereto of the proceeds of the two mill tax, the Water Company is entitled to payment out of the general funds of the town. The limitations in subdivision 71 of § 1622 of the New Mexico Compiled Laws of 1884, are not upon the power to contract for a supply of water for public uses, but upon the power to levy this special tax of two mills on the dollar in aid of the payment therefor. When the two mill tax is insufficient the deficiency must be paid from the general revenues of the town.

United States v. County of Clark, 96 U. S., 211, 214–5.
United States v. County of Macon, 99 U. S., 582, 589.
County of Macon v. Huidekoper, 99 U. S., 592.
Knox County v. United States, 109 U. S., 229–230.
Macon County v. Huidekoper, 134 U. S., 332, 336.
Creston Water works Co. v. City of Creston, 101 Iowa, 687,695–7.

In Creston Waterworks Co. v. City of Creston, 101 Iowa, 687, section 641 of the Iowa code authorizes cities or towns to contract with an individual or company

operating water works " to supply said city or town with " water for fire purposes, and for such other purposes " as may be necessary for the health and safety thereof, " and to pay therefor such sum or sums as may be " agreed upon between said contracting parties " (101 Iowa 693). Section 643 of the code provides that " if " the right to build, maintain, and operate such works " is granted to private individuals or incorporated " companies by such cities or towns, and said cities or " towns shall contract with said individuals or com- " panies for a supply of water for any purpose, such " city or town shall levy each year, and cause to be " collected, a special tax as provided for above, suffi- " cient to pay off such water rents so agreed to be paid " to said individual or company constructing said " works; provided, however, that said tax shall not " exceed the sum of five mills on the dollar for any " one year " (101 Iowa, 694).

It was held that " when the fund arising from such " special tax is insufficient to meet the obligation of " the city under its contract, it may meet the deficiency " from its general revenues ".

The court say (101 Iowa, 695–7):

" The limitations in section 643 are not upon the power to contract for a supply of water for public uses, but upon the power to levy this special tax in aid of the payment therefor. When, within the limit of the five mill tax, the supply can be thus paid for, it must be so paid; but when that source is not sufficient, the deficiency may be paid from the general revenues. * * * Looking to the statutes referred to, we have no doubt as to the power of the defendant city to contract as it did, nor of its right and liability to pay any deficiency that may remain after applying the proceeds of the five-mill levy, out of its general revenues in satisfaction of the agreed price for water for public uses."

In United States v. County of Clark, 96 U. S., 211, a county subscribed for stock of a railroad corporation, and issued bonds in payment therefor, pursuant to the following statute: " It shall be lawful for the cor- " porate authorities of any city or town, or the county

" court of any county, desiring so to do, to subscribe " to the capital stock of said company, and may issue " bonds therefor, and levy a tax to pay the same not " to exceed one-twentieth of one per cent. upon the " assessed value of taxable property for each year " (96 U. S. 212-3).

It was held " that the bonds are debts of the county " as fully as any other of its liabilities, and that for " any balance remaining due on account of principal " or interest after the application thereto of the pro- " ceeds of such tax the holders of them are entitled to " payment out of the general funds of the county."

The court say (96 U. S. 214-5):

" The question presented by the record is, whether the relator is entitled to payment of his judgment out of the general funds of the county, so far as the special tax of one-twentieth of one per cent. is insufficint to pay it. And we think that he is thus entitled is plain enough, unless the act which gave the county authority to issue the bonds directs otherwise. That act gave plenary authority to the county to subscribe to the capital stock of the railroad company and to issue bonds therefor, but imposed no limit upon the amount which it empowered a county to subscribe, and for the payment of which authority was given for the issue of county bonds. This was left to the discretion of the county court. So it has been held by the Supreme Court of the State. State v. Shortridge *et al.*, 56 Mo., 126. A limitation was, however, prescribed for the special tax which was allowed to be levied. But that was a special tax, distinct from and in addition to the ordinary tax which, by other statutes, the county court was authorized to levy; probably supposed to be made necessary by the new liabilities the county might assume. There is no provision in the act that the proceeds of the special tax alone shall be applied to the payment of the bonds. None is expressed, and none, we think, can fairly be implied. It is no uncommon thing in legislation to provide a particular fund as additional security for the payment of a debt. It has often been done by the States, and more than once by the Federal government. The act of Congress of Feb. 25, 1862 (12 Stat. 346), set apart the coin paid for duties on imported goods as a special fund for the payment of interest on the public debt and for the purchase of one per cent. thereof for a sinking fund; yet no one ever thought the obligation to pay the debt is limited by the

amount of the duties collected. Limitations upon a special fund provided to aid in the payment of a debt are in no sense restrictions of the liability of the debtor. Why, then, must not the special tax of one-twentieth of one per cent. be regarded as merely an additional provision made for the payment of the new debt authorized, rather than as a denial to the creditors of any resort to the ordinary sources from which payment of county debts is to be made? Why should such a provision be construed as placing the holders of the bonds in a worse situation than that of other creditors of the county? These bonds are a debt of the county as fully as is any other liability. Had the act which gave power to the county to issue them said nothing of any special tax, there could be no question that the holders of the bonds, like other creditors, would have a resort to the money in the county treasury collected for the discharge of its obligations. * * * * And surely it is not to be held, unless such a construction of the statute is absolutely necessary, that when the legislature authorized the county to incur the debt, it intended to deny to the creditor the right to look to the treasury of the county for its payment; in other words, that the debt was sanctioned, but that it was stripped of the usual incidents of a debt, and the debtor was relieved from attendant liabilities. And it is not to be inferred, from a provision giving the creditor the benefit of a special fund, that it was intended to place him in a worse position than that he would have occupied had no such provision been made. And that, too, in the absence of any direction that he must look exclusively to that fund. Such is not a reasonable construction of the statute. Such is not a fair implication of its purpose. It accords neither with its letter nor with its spirit."

4. The contract to pay the semi annual hydrant rents is one relating to the ordinary expenses of the town, and the rent agreed to be paid is payable out of the general revenues of the town among its other current expenses. It is not payable exclusively out of the special fund provided by the two mill tax; nor does it constitute an "indebtedness" within the meaning of the New Mexico Compiled Laws of 1884, or the Harrison Act (24 U. S. Stat. at Large, p. 171).

Walla Walla v. Walla Walla Water Co., 172 U. S. 1, 19–21.

GEORGIA.

Lott v. Mayor, 84 Ga., 681–3.

ILLINOIS.

E. St. Louis v. E. St. L. G. L. & C. Co., 98 Illinois, 416, 430.

Carlyle Water, Light & Power Co. v. City of Carlyle, 31 Illinois App., 325, 339; 140 Illinois, 445, 453.

INDIANA.

City of Valparaiso v. Gardner, 97 Indiana, 2, 5–6.

Foland v. Town of Frankton, 142 Indiana, 546, 548–550.

Seward vs. Town of Liberty, 142 Indiana, 551, 554.

IOWA.

Grant v. City of Davenport, 36 Iowa, 396, 402–4.

Burlington Water Co. v. Woodward, 49 Iowa, 58.

Des Moines v. Waterworks Co., 95 Iowa, 367.

Creston Waterworks Co. v. City of Creston, 101 Iowa, 687, 695–7.

LOUISIANA.

Laycock v. City, 35 La. Ann., 475, 479.

New Orleans Gas Light Co. v. City of New Orleans, 42 La. Ann., 188.

MASSACHUSETTS.

Smith v. Dedham, 144 Mass., 177, 180.

MISSOURI.

Saleno v. Neosho, 127 Missouri, 627, 638–641.

Lamar W. & E. L. Co. v. City of Lamar, 128 Missouri, 189, 223.

Water Co. v. City of Neosho, 136 Missouri, 498, 511.

Water & Light Co. v. City of Lamar, 140 Missouri, 145.

OKLAHOMA.

Territory *ex rel.* Woods v. Oklahoma, 37 Pacific Rep., 1094.

NEW YORK.

Utica Water Works Co. v. City of Utica, 31 Hun, 427, 430–1.

PENNSYLVANIA.

Wade v. Borough, 165 Pennsylvania, 479, 488.

WASHINGTON.

Winston v. Spokane, 12 Washington, 524–7.
Faulkner v. City of Seattle, 53 Pacific Rep., 365.

WISCONSIN.

Merrill Ry. & L. Co. v. City of Merrill, 80 Wis., 358, 361.

In Walla Walla v. Walla Walla Water Co., 172 U. S., 1, a city agreed to pay a Water Company a hydrant rental of $1,500 per annum for twenty five years, or an aggregate amount of $37,500. The city charter limited the "indebtedness of the city" "at fifty thousand "dollars." At the time the contract was made, the city was indebted in a sum exceeding $16,000, which, if added to the aggregate amount of hydrant rentals, would create a debt exceeding the limited amount of $50,000 (172 U. S., 19).

It was held that the amount of the hydrant rentals was not an indebtedness within the meaning of the charter.

The court say (172 U. S., 19–21) :

" But we think the weight of authority, as well as of reason, favors the more liberal construction that a municipal corporation may contract for a supply of water or gas or like necessary, and may stipulate for the payment of an annual rental for the gas or water furnished each year, notwithstanding the aggregate of its rentals during the life of the contract may exceed the amount of the indebtedness limited by the charter. There is a distinction between a debt and a contract for a future indebtedness to be incurred, provided the contracting party perform the agreement out of which the debt may arise. There is also a distinction between the latter case and one where an absolute debt is created at once, as by the issue of railway bonds, or for the erection of a public improvement, though such debt be payable in the future by installments. In the one case the indebtedness is not created until the consideration has been furnished ; in the other the debt is created at once, the time of payment being only postponed.

" In the case under consideration the annual rental did not become an indebtedness within the meaning of the charter until the water appropriate to that year had been furnished. If the company had failed to furnish it, the rental would not have been payable at all, and while the original contract provided for the creation of an indebtedness, it was only upon condition that the company performed its own obligation. Wood v. Partridge, 11 Mass. 488, 493. A different construction might be disastrous to the interests of the city, since it is obviously debarred from purchasing or establishing a plant of its own, exceeding in value the limited amount, and is forced to contract with some company which is willing to incur the large expense necessary in erecting water works upon the faith of the city paying its annual rentals. Smith v. Dedham, 144 Mass. 177 ; Crowder v. Sullivan, 128 Indiana, 486 ; Saleno v. Neosho, 127 Missouri, 627 ; Valparaiso v. Gardner, 97 Indiana, 1 ; New Orleans Gas Light Co. v. New Orleans, 42 La. Ann. 188 ; Merrill Railway & Lighting Co. v. Merrill, 80 Wisconsin, 358 ; Weston v. Syracuse, 17 N. Y. 110 ; East St. Louis v. East St. Louis Lighting Co., 98 Illinois, 415 ; Grant v. Davenport, 36 Iowa, 396 ; Lott v. Waycross, 84 Georgia, 681 ; Burlington Water Co. v. Woodward, 49 Iowa, 58.

" The obvious purpose of limitations of this kind in municipal charters is to prevent the improvident contracting of debts for other than the ordinary current expenses of the municipality. It certainly has no reference to debts incurred for the salaries of

municipal officers, members of the fire and police departments, school teachers or other salaried employes to whom the city necessarily becomes indebted in the ordinary conduct of municipal affairs, and for the discharge of which money is annually raised by taxation. For all purposes necessary to the exercise of their corporate powers they are at liberty to make contracts regardless of the statutory limitation, provided, at least, that the amount to be raised each year does not exceed the indebtedness allowed by the charter. Among these purposes is the prevention of fires, the purchase of fire engines, the pay of firemen and the supply of water by the payment of annual rentals therefor."

Grant v. City of Davenport, 36 Iowa, 396, headnote: "A contract entered into by the city with a "company for the supply of water to the city for a "term of years by such company, who was to receive a "certain annual rate therefor, is one relating to the "ordinary expenses of the city, and the rate agreed to "be paid is not an indebtedness prohibited by the "constitution."

The court say (36 Iowa 402-3):

"But, if it can induce individuals or a corporation to construct and maintain such works for the use and benefit of the municipality and its inhabitants, and can pay a just and fair rent, as agreed, out of its current revenues, and can also, out of such revenues, pay its other ordinary expenses, we can see no sufficient reason for holding that an agreement to pay such rent either weekly, monthly, quarterly or annually, creates an indebtedness against the city. If it did create an indebtedness, then an ordinance providing for the payment of the salaries to the officers of the city would also create an indebtedness and would be invalid, where the maximum of indebtedness has already been reached. And such a construction would also render invalid every contract for the delivery of lumber to repair a bridge or a sidewalk, or for the hauling of gravel to repair a street, or for the employment of a laborer to work thereon."

And further, pp. 403-4:

"Suppose a man having a family to support and is without other means to do it, except his salary, which is adequate for that purpose. He is compelled to rent a house to live in, and by a contract for a term of years he can reduce its cost, and he therefore

makes a lease for ten years at $300 per year, or $3,000 for the term, the rent being payable monthly, quarterly or annually. Has that man created an indebtedness of $3,000? * * * * * We think not. Or, if instead of renting a house, he should contract for the board of his family for a like term, at $1,000 per year, does he thereby become indebted in the sum of $10,000? It seems to us not."

City of Valparaiso v. Gardner, 97 Indiana, 2, headnote:

"The limitation in the amendment to the Constitution, "adopted in 1881, to the indebtedness of any political "or municipal corporation, does not apply to water to "be paid for as the water is furnished, provided the "contract price can be paid from the current revenues "as the water is furnished, without increasing the "corporate indebtedness beyond the constitutional "limit, or encroaching upon funds set apart to other "purposes."

The court say (97 Indiana, 5):

"If we hold that the contract to pay an annual water rent of $6,000 during a period of twenty years creates a debt for the aggregate sum of $120,000, and is a debt within the prohibition embodied in the Constitution, we should lay down a principle that would, in a great majority of instances, put an end to municipal government. If it be true that an agreement to pay a given sum each year for a long period of years constitutes a debt for the aggregate sum resulting from adding together all the yearly installments, then it is extremely doubtful whether there is a city in the State that has authority to repair a street, dig a cistern or build a sidewalk, for nearly every city has contracts for gas and water supplies running for a long series of years, in which the aggregate amount of annual rents would of themselves equal, if not exceed, the limit of two per centum on the value of taxable property. We know, as matter of general knowledge, that water works and gas works require the outlay of enormous sums of money, and that such enterprises are not undertaken under contracts running for short periods of time. If the aggregate sum of all the yearly rents is to be taken as a debt within the meaning of the Constitution, then many cities will be left without the means of procuring things so essential to public welfare and safety. We are not to presume, unless coerced by the rigor of the words used, that the framers of

the amendment, or the electors who voted for it, intended to destroy the corporate existence of our municipalities or to leave them without water or light."

And further, p. 6:

"We can not, therefore, by mere intendment declare that the electors of the State meant to lay down a rule that should practically take from the inhabitants of our cities the power to supply themselves with water or light. To reach the conclusion that they meant to do this, we must find clear warrant in the language of the constitutional provision itself."

E. St. Louis v. E. St. L. G. L. & C. Co., 98 Illinois, 416, headnote: "Where a city entered into a contract "for lighting its streets for a term of thirty years, the "agreed price therefor to be paid monthly, which sum "for any one year was not in excess of the limitation "in sec. 12, of art. 9, of the constitution, but, taken for "the whole term, was in excess of the debt it was "authorized to incur, it was held, that the contract was "not prohibited by the constitutional provision, but "was legal and binding, there being created no pres-"ent indebtedness for the whole sum, but only as the "gas should be supplied from month to month."

The court say (98 Illinois, 430):

"We do not assent to the correctness of this view.

"The contract was for the furnishing of an article for nightly consumption by the city during a period of thirty years, fixing the price at which the article should be furnished. There was no indebtedness in advance of anything being furnished, but indebtedness arose as gas should have been furnished along from night to night during the period of thirty years. The contract provides for the payment, monthly, at the end of each month, the amount that became due for the month then ended. When the company has furnished the gas for a certain month, then there is a liability—an indebtedness arises—and not before, as we conceive. Hence the amounts that might become due and payable under the contract in future years, did not constitute a debt against the city at the time of the entering into the contract, within the meaning of the constitution."

In Smith v. Dedham, 144 Mass., 177, the selectmen of a town, under a vote of the town authorizing it to do so, made a contract with a water company for three years, at a certain rate a year, for the service of a certain number of hydrants. At the expiration of the three years, a town meeting was duly called and it was voted " that the selectmen be authorized to renew the contract " for ten years with the " water company at a reduced rate per year.

It was held that, by the vote, the town did not incur a debt, within the meaning of the Pub. Sts. c. 29, § 1.

The Court say (144 Mass. 180) :

" The contract which the selectmen are authorized to make is one which we assume is for a sum of money to be paid annually, among the other current expenses of the town. The payments are to be made out of the moneys annually granted by the town and raised by taxation. It is, in effect, a cash transaction, where the payments are made *pari passu* with the accumulation of the yearly service which determines the amount to be paid. Grant v. Davenport, 36 Iowa, 396. It is like the other ordinary expenses of the town, within the limit of its annual current expenses. The town of Dedham by its vote did not incur a debt, within the fair meaning of the Pub. Sts. c. 29, § 1."

Saleno v. City of Neosho, 127 Missouri, 627, head note : " A contract by a city to pay a fixed price " annually for twenty years for furnishing water, such " payment to be contingent on the water being sup- " plied, does not create an indebtedness on the part of " the city within the meaning of the constitution, " article 10, section 12, fixing the limit of municipal " indebtedness."

In Wade v. Borough, 165 Pa., 479, head note : " An " annual sum to be paid monthly for lighting the " streets of a borough for a limited term is not the in- " curring of a new indebtedness within the meaning of " the constitution, or of the act of April 20, 1874, P. " L. 65."

The court say (165 Pa. 488):

"An annual sum to be paid monthly for lighting the streets for a limited term, is not the incurring of a new indebtedness within the meaning of the constitution, or of the act of 1874; and there is no evidence that this contract was framed to evade the inhibitions of either. The borough binds itself to pay $133.33 per month for lighting the streets. This was a current expense, the same as if it had rented a council chamber for a fixed term of years, at a monthly rental. * * * *

"Therefore it was not, in any reasonable sense of the words as used in the constitution, the incurring of an indebtedness to the amount of the aggregate monthly installments for the seven years."

(a) Where an agreement is made to render services or to furnish supplies to a municipal corporation for a future period of time, and the corporation agrees to pay therefor at stated intervals, the future or periodical payments do not become obligatory and are not an indebtedness until the service or other consideration for that particular period has been rendered, the indebtedness being deemed to be conditional upon performance, and the debt limit applying only where an overdue payment will raise the indebtedness above the limit.

State v. McCauley, 15 California, 429, 454–5.
Mayor v. McWilliams, 67 Georgia, 106, 115.
Crowder v. The Town of Sullivan, 128 Indiana, 486–8.
Weston v. City of Syracuse, 17 N. Y., 110.
Garrison v. Howe, 17 N. Y., 458, 465.

(b) If this were not so the debt limit of every municipality might be exceeded by reason of the future salaries of its officers, the wages of its servants, and by the amount that would ultimately be earned on its contracts for gas, water, electric light and telephone service.

5. The town is estopped from questioning the validity of ordinance No. 10.

(a) A town which induces a Water Company to con-

struct a water works for its benefit (Ordinance, pp. 19, 21), at an expense of $115,000 (pp. 4, 26, 63, 75), which for several years has remained in the undisturbed use, enjoyment and possession of the complainant's water plant under and by virtue of the contract (Ans., pp. 14, 15) cannot, at least while enjoying the benefits of the contract, and while claiming that the contract still binds the Water Company to continue those benefits, refuse to pay the stipulated rent.

Illinois T. & S. Bk. v. Arkansas City, 40 U. S. App., 259, 293–7.
National Waterworks Co. v. Kansas City, 27 U. S. App., 166, 179.
Safety Insulated Wire and Cable Co. v. Baltimore, 25 U. S. App., 166, 170–4.
Fergus Falls Water Co. v. City of Fergus Falls, 65 Fed. Rep., 586, 591.
Walla Walla Water Co. v. City of Walla Walla, 60 Fed. Rep., 960–1; affd. 172 U. S., 1, 23.
Hitchcock v. Galveston, 96 U. S., 341, 350–1.
E. St. Louis v. E. St. L. G. L. & C. Co., 98 Illinois, 415, 427–9.
Water Works Co. v. City of Columbus, 48 Kansas, 99, 113–6.
State v. G. F. City Council, 19 Montana, 519, 533–5.
U. S. Water Works Co. v. Du Bois, 176 Pennsylvania, 439, 443.

In Illinois T. & S. Bk. v. Arkansas City, 40 U. S. App., 259, headnote:

"As against the bondholders who loaned their "money on a mortgage of the plant and income of "water works owned by the mortgagor, which had "been built under the direction and accepted by the "formal resolution of the city council of a city as "completed according to the terms of a defeated "ordinance upon its records, and for which the city "had paid rental without protest for fourteen months "according to the terms of this ordinance, such city "is estopped to defeat a recovery for the rents sub-"sequently accruing according to the terms of the

"ordinance, either on the ground that there was no "contract, or that the city had no power to contract "for twenty one years, or that it had no power to "grant to the water company the exclusive right to "use its streets for laying water pipes."

The court say (40 U. S. App. 293):

"There is another and a conclusive reason why this city cannot maintain any of the defenses it has interposed in this suit. It is that it cannot accept the benefits and repudiate the burdens of its contract. It is that it cannot be heard to deny the truth of the representations of the existence and of the execution of this contract which its records and its conduct have constantly made, and in reliance upon which the gas company and the water company constructed and extended the water works, and the bank and the bondholders loaned their money. No principle is more universal in the jurisprudence of civilized nations, no principle is more equitable in itself, or more salutary in its effects, than that no one may, to the damage of another, deny the truth of statements and representations by which he has purposely or carelessly induced that other to change his situation. * * * * This principle is as applicable to the transactions of corporations as to those of individuals."

And further, pp. 294-6:

"In a business transaction like that of procuring the construction of water works and the use of water for itself and its inhabitants, a municipality is subject to this principle to the same extent as a private corporation. The same rules govern its business transactions that govern the negotiations of private individuals and corporations. * * * *

"The city of Arkansas City spread upon the records of its city council an ordinance, approved by its mayor, which purported to be an offer to the gas company to pay the rentals whose recovery is sought in this suit in consideration that the company would construct and operate these waterworks. The company accepted the supposed offer, and at the expense of thousands of dollars constructed and operated the works according to the terms of the ordinance under the express direction of the city council. The city accepted the original plant by a resolution spread upon its records. * * * Bonds to the amount of $100,000 were immediately issued

and sold in open market upon the faith of this contract by the city, its performance by the mortgagor evidenced by the acceptance of the city council and by the fact that the latter had paid the rentals under it for fourteen months without protest. How can that city now be heard to say to the holders of these bonds that all these representations were false, that it had no power to make this contract, or that it never made it, or that it was never performed when it still continues to take and use the water from the hydrants? It cannot. * * * *

"But this is not all. After this mortgage was made the city council of this city by motions duly carried and resolutions properly passed accepted seventy five additional hydrants erected upon extensions of these works made under its orders, and its city clerk certified over the seal of the city that these hydrants had been erected and accepted by the city * * * and that certain rentals had accrued thereon from the city, which were sufficient in amount to pay the interest on the remaining $50,000 of bonds. These certificates were presented to the trustee under the trust deed, and in reliance upon them * * * it issued the remaining bonds, and they have been purchased by their holders. The city has used these hydrants to the present time. * * * * Upon every principle of justice and of equity it is too late now for it to deny the truth of these representations while it retains the benefits they procured for it. It must return the $50,000 and interest which its acts and conduct induced the bondholders to part with before it can be heard to say that the representations they made were false."

In National Waterworks Co. v. Kansas City, 27 U. S. App., 166, headnote: "Where for a period of over "eighteen years a city has recognized and accepted a "waterworks system as having been constructed in "full compliance with the demands of the contract "under which it was built and operated, it is too late "for the city to repudiate such recognition."

The court, per BREWER J., say (27 U. S. App., 179):

"In its cross bill the city has made claim for damages and insisted that the waterworks system does not come up in efficiency and completeness to the requirements of the contract. We agree with the Circuit Court, after reviewing carefully the testimony, that the city is not entitled to maintain this claim. It has for many

years recognized and accepted this waterworks system as having been constructed in full compliance with the demands of the contract, and it is now too late to repudiate such recognition."

(b) If the town desires to repudiate the contract the least it can do is to cease availing itself of its benefits (Cases cited above). As it is at present, although the town has repudiated the contract, yet if the Water Company should wilfully stop its works a single day it would risk the forfeiture of its charter, and if the breach of its duties were continued for any substantial period it would certainly forfeit it.

6. The cases that may be cited by the appellee are inapplicable.

They may be divided into the following classes:

(a) Cases applying the rule that where a statute authorizes a municipality to incur an expense but requires that it must be paid *exclusively* out of the proceeds of a special tax, the general funds of the municipality are exempted from its payment, and it can be paid only to the extent of the proceeds of the special tax.

Webster v. People, 98 Illinois, 343, 349–350.
Second Nat. Bk. v. Lansing, 25 Michigan, 207.
Peake v. City of New Orleans, 38 Fed. Rep., 779.
Findley v. Hull, 13 Washington, 236.

Here the hydrant rents are chargeable on the general funds of the town, if the proceeds of the two mills tax levy are insufficient to pay them.

(b) Cases holding that no obligation or liability even for the current expenses of municipalities, for wages of laborers, salaries of public officers, or any purpose whatever, is exempted from the prohibition of a constitution limiting the indebtedness which may be incurred by municipal corporations, after they have reached the debt limit.

Lake County v. Rollins, 130 U. S., 662.
Lake County v. Graham, 130 U. S., 674.

City of Springfield v. Edwards, 84 Illinois, 632–3.
French v. City of Burlington, 42 Iowa, 614.

Here the town had not contracted any indebtedness by borrowing money or issuing bonds for any purpose (p. 78), and the contract to pay hydrant rents did not create an indebtedness within the meaning of the Harrison Act.

(c) Cases holding that a contract by a town to pay water or gas rents for a term of years, relates to the necessary current expenses of the town, and does not create an "indebtedness" within the meaning of a constitutional debt limit, but that if, at the time the contract to pay water or gas rent is made, the town is indebted up to the constitutional limit, it is thereby prohibited from making any contract whereby a liability or obligation is created, even for the necessary current expenses in the administration of the affairs and government of the town.

Prince v. City of Quincy, 105 Illinois, 138, 141–3.
Prince v. City of Quincy, 105 Illinois, 215–7.
Same v. Same, 128 Illinois, 443.
City of Laporte v. Gamewell Fire Alarm Tel. Co., 146 Indiana, 466, 469–473.
Davenport v. Kleinschmidt, 6 Montana, 502, 543–5.
Read v. Atlantic City, 49 New Jersey Law, 559.
Beard v. City of Hopkinsville, 95 Kentucky, 239.
Spilman v. Parkersburg, 35 W. Va., 605.
Kiehl v. City of South Bend, 44 U. S. App., 687, 692–4.
Murphy v. East Portland, 42 Fed. Rep., 308.

(d) Cases holding that a contract by a town to pay a Water Company a yearly rent of $1,800 violates a statute forbidding the creation of any *liabilities* in any manner in excess of $1,000, and that such a contract

violates a statute forbidding the incurring of *liabilities* exceeding in any one year the revenue for such year.

Salem Water Co. v. City of Salem, 5 Oregon, 29.

Niles Water Works v. Mayor, 59 Michigan, 311.

Humphreys v. Bayonne, 55 N. J. L., 241.

(e) The cases as to the legal effect of contracts to erect a building, to buy property or to rent land. These cases have no application to the case at bar.

See Walla Walla v. Walla Walla Water Co., 172 U. S., 19.

II. Ordinances Nos. 64 and 65 impaired the obligation of the contract contained in Ordinance No. 10.

1. Ordinance No. 64 impaired the obligation of the contract.

(a) The contract was that the town agreed to pay hydrant rents of $1,962.50 every six months for twenty five years, and agreed " to levy and collect a tax suffi- " cient for the purpose of making said semi annual " payments for each and every one of the twenty five " years aforesaid " (p. 21). On March 18, 1895, in order to carry out this contract the town appropriated " Amount due the Raton Water Works Company, up to " January 1st, 1895 $4735.15." " Amount to pay " water works Co., for fire hydrants, for the year " commencing January 1st, A. D., 1895 $3,935 " (Ordinance No. 59, p. 9).

On May 23, 1895, the town board of trustees passed an ordinance repealing all but $1,500 of this appropriation, under the guise of making an appropriation " To " supply the town with water $1,500 " (p. 11) to pay $8,670.15 of hydrant rents, and at the same time changing the date of the fiscal year so as to deprive the town treasurer of all power to pay $4,735.15 of warrants that were duly issued by the town to the Water Company in payment of hydrant rent (Ordinance No. 64, pp. 11–12; Bill, p. 5; Ans., p. 14).

(b) Where a town contracts to pay hydrant rent and to levy and collect a tax sufficient to pay it for twenty five years, makes a sufficient appropriation for that purpose, and thereafter partly repeals the appropriation, the repealing ordinance impairs the obligation of the contract.

Seibert v. Lewis, 122 U. S., 284, 291, 296–300.

Von Hoffman v. City of Quincy, 4 Wall., 535, 554–5.

Nelson v. St. Martin's Parish, 111 U. S., 716.

(c) An ordinance depriving a town treasurer of power to pay warrants already lawfully issued to *bona fide* holders, which provides no other fund to pay the warrants, impairs the obligation of the contract created when the warrants were issued.

Keith v. Clark, 97 U. S., 454.
Hartman v. Greenhow, 102 U. S., 672.
Virginia Coupon Cases, 114 U. S., 271, 302-3.
McGahey v. Virginia, 135 U. S., 662.

2. Ordinance No. 65 impaired the obligation of the contract.

(a) By the law in force when ordinance No. 10 was passed it was made the duty of the town clerk to register the town warrants in the order in which they were presented and to pay them out of the town funds accordingly (New Mexico Compiled Laws 1884, §§ 1649–1650.) Ordinance No. 65 made all the town warrants issued at a date which is subsequent to that of the Water Company's warrants, receivable "in pay-"ment of all town licenses" (Ordinance No. 65, p. 12; Bill, p. 5; Ans., p. 14), thereby not only discriminating against the Water Company's warrants, but debasing the fund out of which all warrants are payable by substituting scrip for cash. The effect of this ordinance is to render any mandamus to enforce the payment of the Water Company's warrants ineffectual, since the town funds would then consist of its own warrants instead of lawful money.

(b) The debasement of a fund out of which warrants already issued are payable, by substituting scrip for lawful money, impairs the obligation of the contract created when the warrants were issued, to pay them in lawful money.

Fazende v. City of Houston, 34 Fed. Rep., 95.
Board of Liquidation v. McComb, 92 U. S., 531, 539-540.
Maenhaut v. City of New Orleans, 2 Woods, 108, 111-4.
Chaffraix v. Bd. of Liquidation, 11 Fed. Rep., 638.

III. The town had no power to impair the obligation of the contract.

1. Because it had not been authorized so to do by the Territorial Legislature.

2. Because the Territorial Legislature was forbidden by the Act of Congress organizing the Territory and by the Constitution of the United States from impairing the obligation of contracts.

(a) New Mexico was organized under an Act of Congress which expressly made its subject to the Constitution and laws of the United States.

9 U. S. Stat. at Large, p. 452; Act of September 9, 1850, § 17.

(b) Where a territory is organized expressly subject to the Constitution and laws of the United States, its legislature has no power to disregard any of the fundamental guarantees of the constitution for the protection of personal rights.

Thompson v. Utah, 170 U. S., 343, 346–350.
American Publishing Co. v. Fisher, 166 U. S., 464, 466–8.
Springville v. Thomas, 166 U. S., 707–9.
Callan v. Wilson, 127 U. S., 540, 548–551.
Reynolds v. U. S., 98 U. S., 145, 154.
Webster v. Reid, 11 Howard, 437, 460.

(c) Even Congress, in any territory formally organized by it under the Constitution, has no power to impair the obligation of contracts, except indirectly by means of a bankruptcy law, a declaration of war, an embargo, or a legal tender act.

Sinking Fund Cases, 99 U. S., 700, 718–9, 724–5.
Legal Tender Cases, 12 Wall., 547–550.
Hepburn v. Griswold, 8 Wall., 604.

IV. The bill made out a proper case for equitable relief; but even if it had not, the Territorial Supreme Court erred in dismissing it generally (p. 30), and in deciding that Ordinance No. 10, so far as it is questioned, is void; that Ordinance No. 59 and the warrants issued to the complainant are void, and that Ordinance No. 64 is valid (Certificate, p. 66; Opinion, pp. 38-9, 50), thus conclusively adjudging all the vital questions in the case in favor of the town, and thereby barring forever any new action or suit to enforce the Water Company's present claims.

1. Equitable relief is proper.

(a) This suit was brought following National Water works Co. v. Kansas City, 27 U. S. App., 165, 173-4, 179-183, and Fazende v. City of Houston, 34 Fed. Rep., 95, and it is fully covered by the authority of those cases.

(b) Specific performance of the contract contained in ordinance No. 10, at least to the extent of declaring it a valid and subsisting contract, binding and obligatory on the town, and ordering the town to pay the hydrant rentals, should have been granted.

National Waterworks Co. v. Kansas City, 27 U. S. App., 165, 173-4, 179-183.

(c) The town should have been enjoined from further breaches of the contract.

Where an ordinance debases the fund out of which warrants already issued are payable, by requiring town warrants issued after the passage of the ordinance, to be received in lieu of cash, the enforcement of the ordinance will be restrained by injunction.

Fazende v. City of Houston, 34 Fed. Rep., 95.

Board of Liquidation v. McComb, 92 U. S., 531, 539–540.
Maenhaut v. City of New Orleans, 2 Woods, 108, 111–4.
Chaffraix v. Bd. of Liquidation, 11 Fed. Rep., 638.

Where a town passes an ordinance repealing a valid appropriation previously made to pay warrants issued for prior water rents, as well as to pay current water rents, and changes the date of the commencement of the fiscal year so as to deprive the town treasurer of all power to pay not only $4,400 of warrants lawfully issued before the repealing ordinance was passed, but also depriving him of the power to pay the larger part of the water rents for the current year, the enforcement of the invalid repealing ordinance, so far at least as it restrains the town treasurer from performing the duties imposed on him by the territorial law (Compiled Laws, §§ 1649–1650), should be restrained by injunction.

Fazende v. City of Houston, 34 Fed. Rep., 95.
Board of Liquidation v. McComb, 92 U. S., 531.

" Where a party claims a franchise under a statute, " and is in the possession and enjoyment of such fran- " chise, equity will interpose to protect and secure the " enjoyment of such franchise, because it affords the " only plain and adequate remedy."

Boston Water Power Co. v. Boston & Worcester R. R. Co., 16 Pick., 525.
St. Louis R. R. Co. v. N. W. St. L. Ry. Co., 69 Missouri, 65, 71–2.
Newburgh Turnpike Co. v. Miller, 5 John. Ch., 101, 110–1.

While a court of equity may not restrain the *passage* of an invalid municipal ordinance, yet it can and should restrain the *enforcement* of an invalid ordinance, whenever vested rights granted by a prior ordinance would be thereby impaired. And this rule applies with

particular force to a case where the enforcement of an invalid ordinance violates the vested rights of a water company.

New Orleans Water Works Co. v. Rivers, 115 U. S., 674, 683.
New Orleans Gas Co. v. Louisiana Light Co., 115 U. S., 673.
Walla Walla v Walla Walla Water Co., 172 U. S., 1.
Foster v. City of Joliet, 27 Fed. Rep., 899.
Pennoyer v. McConnaughy, 140 U. S., 1.
City of Quincy v. Bull, 106 Illinois, 337.
Mayor v. Radecke, 49 Maryland, 217, 231-2.
People v. Sturtevant, 9 N. Y., 263, 273-9.

Let us test it. Suppose that during the pendency of this dispute the Water Company had threatened to shut off the water from the hydrants leased to the town, unless the town paid the back hydrant rent, or had threatened to shut off the water from a consumer unless he paid the whole of a water bill over the amount of which an honest dispute had arisen. In either case equity would grant a mandatory injunction *pendente lite*, requiring the water to be furnished pending the determination by the court in the course of the injunction suit, of the amount justly due the Water Company, on the payment of which amount a perpetual injunction would issue.

VanNest Land Co. v. New York Water Co., 7 App. Div., 295.
Sickles v. Manhattan Gas Light Co., 64 How. Pr., 33, 35-41.
Same v. Same, 66 How. Pr., 314.
Cromwell v. Stephens, 2 Daly, 15.
1 Beach on Injunctions, §§ 35, 436.
Bienville Water Supply Co. v City of Mobile, 112 Alabama, 260.
Graves v Key City Gas Co., 83 Iowa, 714; 93 Iowa 470.
Wood v Auburn, 87 Maine, 287.
American Water Works Co. State, 46 Nebraska, 195, 202-4.
Whiteman v Fuel Gas Co., 139 Pa., 492, 496-7.
Sewickley Borough School District v Gas Co., 154 Pa., 539.
Gas Co. v Gas Co., 186 Pa., 444, 454-5.

The fact that the Water Company voluntarily invoked the aid of a court of equity, should not deprive it of the rights which it would have had if it had threatened to cut off the water from the hydrants, and the town had thereupon filed a bill to enjoin it from doing so.

2 A decree dismissing a bill in an equity suit, which is absolute in its terms, and which the opinion and certificate of the court below show was made on the merits (pp. 66, 38-9, 50), is a final determination of the controversy, and constitutes a bar to any further litigation of the same subject between the same parties.

Durant v Essex Company, 7 Wall., 107, 109–110.
Lessee of Parrish v Ferris, 2 Black, 606, 610.
Case v Beauregard, 101 U. S., 688.
2 Black on Judgments, §§ 720–2.
1 Freeman on Judgments, 4 ed. § 270.

If ordinance No. 10 and the warrants issued under it are void (Certificate, p. 66) the town is entitled to have the bill dismissed absolutely; but on the other hand if the ordinance and warrants are valid, the Water Company is entitled either to relief in equity, or at least to have the bill dismissed without prejudice to an action at law.

3. If therefore ordinance No. 10 and the warrants issued under it are valid, it was error to dismiss the bill absolutely, and the judgment must be reversed and the cause remanded, even though it should be held that the Water Company ought to have brought an action at law instead of a suit in equity.

Rogers v. Durant, 106 U. S., 644, 646.
Buzard v. Houston, 119 U. S., 347, 354.
Horsburg v. Baker, 1 Peters, 232, 237.
Barney v. Baltimore City, 6 Wall., 280, 289.
Kendig v. Dean, 97 U. S., 423, 426.
Hobson v. M'Arthur, 16 Peters, 195.
Miles v. Caldwell, 2 Wall., 45.

Rogers v. Durant, 106 U. S., 644, headnote:

"A decree of the Circuit Court, dismissing upon "the merits a bill of which this court on appeal holds "that there is no jurisdiction in equity, will be "reversed, and the cause remanded with directions to "dismiss the bill without prejudice to an action at "law, and with costs in the court below, and each "party to pay his own costs on the appeal."

The court say (106 U. S. 646):

"There being no sufficient evidence of loss, there can be no doubt that the case is one within the exclusive jurisdiction of a court of law. * * *

"The decree of the Circuit Court, dismissing the bill generally, might be considered a bar to an action at law, and should therefore be reversed, and the cause remanded with directions to enter a decree dismissing the bill for want of jurisdiction, without prejudice to the right of the plaintiff to sue at law. (Horsburg v. Baker, 1 Pet. 232; Barney v. Baltimore City, 6 Wall. 280; Kendig v. Dean, 97 U. S. 423.)"

Lastly. The decree of the Supreme Court of the Territory of New Mexico should be reversed and that of the District Court affirmed.

HENRY A. FORSTER,
Of Counsel for Appellant.

No. 272.

Reply Brf. of Statter for Appt

Supreme Court of the United States.

Filed April 10, 1899.

OCTOBER TERM, 1898.

No. 272.

THE RATON WATER WORKS COMPANY,
Appellant,

against

THE TOWN OF RATON,
Appellee.

APPELLANT'S SUPPLEMENTAL BRIEF.

HENRY A. FORSTER,
Of Counsel.

C. G. Burgoyne, Walker and Centre Streets, N. Y.

In the Supreme Court of the United States

OCTOBER TERM, 1898.

No. 272.

THE RATON WATER WORKS COMPANY,
Appellant,

AGAINST

THE TOWN OF RATON,
Appellee.

Appellant's Supplemental brief in reply to brief and argument of appellee.

I. The agreement to pay a semi-annual hydrant rental for the term of twenty-five years is a contract relating to the current expenses of the town, and the hydrant rental agreed to be paid is partly a rent for the use of the water works system by the town and its inhabitants, but is chiefly a compensation for the water furnished to the town, none of which becomes due until the whole has been earned by the furnishing of the water for the six months for which the stipulated hydrant rental is claimed.

Walla Walla vs. Walla Walla Water Co., 172 U. S., 1, 19-21.

1. The right of a municipality to make a contract for a supply of water, gas, electricity, or for any other necessary services, arises from its duty to procure the services and supplies necessary to enable it to perform its municipal functions.

All municipalities have power to make contracts for the rendition of such services, and to pay for them when rendered out of their general revenues, unless they are restrained therefrom by clear statutory restrictions. Frequently, however, as in the case at bar, there is a statute authorizing the levy of a special tax in aid of some particular town charge, in addition to the general revenues of the town (Compiled Laws, § 1622, subdiv. 71). Where such a special tax levy is provided for it becomes the primary fund for the payment of the charge for whose benefit it was created; but, if it is insufficient for that purpose, then the residue of the charge must be paid out of the annual revenues of the town derived from general taxation and licenses. Again, as in the case at bar, there are statutes prescribing the duration of such a contract, and allowing the town, as a part of the contract, to grant an exclusive franchise to supply its inhabitants with water, gas or electricity for a limited time.

Compiled Laws, § 1622, subdivs. 67, 69.

2. A contract by a Water Company to render daily services to a town by supplying the water necessary for its daily use, and by the town to pay therefor after the water is furnished, creates an ordinary town charge for the rendition of necessary services, payable only after they have been rendered, out of the general revenues of the town, like any other item of current expenses, if the two-mill tax levy is insufficient to discharge them.

Cases cited in appellant's brief, pp. 17–20.

The appellee attempts to answer these arguments in three ways:

(a) By claiming, in substance, that the contract does not bind the town to pay the agreed hydrant rental, while it does bind the Water Company to continue to supply the town with water under the contract.

The town claims that its agreement to pay hydrant rental is void as to the excess of hydrant rental above the proceeds derived from a two-mill tax levy (Appellee's Brief, pp. 1, 6–25), while admitting that it accepted the complainant's plant (Ans., p. 13), that it has ever since possessed and used the forty-four hydrants under and by virtue of the contract (Ans., p. 14), and that it has been and now is in the possession, use and enjoyment of the water plant of the complainant (Ans., p. 15).

(b) By claiming that the town is financially unable to pay the stipulated hydrant rental (Appellee's Brief, pp. 10, 12, 22).

(c) By claiming that the decision of the New Mexican Supreme Court that the town's agreement to pay hydrant rentals, the ordinance making an appropriation for their payment, and the warrants issued by the town to pay back hydrant rentals, are null and void, and that the ordinance repealing the appropriation is valid (Certificate, p. 66), should be affirmed because it is alleged that "The appellant has a plain, speedy "and adequate remedy at law" (Appellee's Brief, p. 27).

Neither of these arguments is well founded.

II. When a town makes a contract with a water company to supply it with water for a term of years, at a stipulated hydrant rental, remains in the possession, use and enjoyment of the water plant, and requires the Water Company to continue supplying it with water under the contract (Ans., pp. 15, 14), it is liable to pay the stipulated hydrant rental so long as it remains in possession of the plant, and it cannot question the validity of the contract while availing itself of its benefits.

Cases cited on pp. 28–32 of Appellant's Brief.

1. Even if a lease is voidable for actual fraud and conspiracy on the part of the landlord, yet so long as the tenant remains in the possession and enjoyment of the demised property, it is liable to pay the stipulated rent and it cannot question the validity of the lease.

Barr vs. N. Y. L. E. & W. R. R. Co., 125 N. Y., 263, 271–2, 276–7.

In Barr vs. N. Y. L. E. & W. R. R. Co., 125 N. Y., 263, it was held that where the possession of property has been transferred under a lease induced by fraud, while the fraud furnishes ground for rescinding the lease and avoiding the obligations imposed thereby, it may not be availed of as a means of continuing possession of the property without meeting those obligations.

The court say (125 N. Y., 271):

"The question, which is raised by the defense to the action, is whether the fraudulent nature of the acts and proceedings, by which the railroad was constructed and the contract of lease effected, is a matter which has reached in its vice so far as, at this day, to disable the plaintiffs from enforcing, against the lessee of their company, the payment of the full amount of rental stipulated for in the lease. * * * There is something repugnant to our sense of justice, and a seeming subversion of ideas respecting property rights, in the position that property may be retained and enjoyed, and payment of the stipulated rental therefor refused by its holder, on the plea of fraudulent practices, or because of the immoral conduct involved in the making of the contract by which the property was transferred and the obligation to pay imposed."

And further, pages 276–7:

"I think it quite incompatible with the principles upon which equity proceeds to hold and use property, the only right to which is derived through a contract of lease, and to refuse payment of a part of the rent stipulated in the contract on the ground of the existence of fraud in its procurement."

2. A tenant is estopped from denying the title of his

landlord, and is bound to pay the stipulated rent so long as he remains in possession of the demised property.

Rector vs. Gibbon, 111 U. S., 276, 284.
Williams vs. Morris, 95 U. S., 444, 455, 458.
Stott vs. Rutherford, 92 U. S., 107, 109–10.
Lucas vs. Brooks, 18 Wall., 436, 451–2.
Woodward vs. Brown, 13 Peters, 1, 4.
Peyton vs. Stith, 5 Peters, 486, 492.

III. The town is able to pay the stipulated hydrant rental.

1. As early as 1893 its assessed valuation was $807,230 (Ans., p. 16); it had no municipal debt up to the time the action was commenced (p. 78), and although allowed to levy a property tax of ten mills on the dollar for municipal purposes (Compiled Laws, 1884, § 1724), it conducted its municipal affairs, even during the depths of the depression caused by the panic of 1893, and by the Debs strike in 1894, on a nominal property tax rate averaging about seven mills on the dollar, of which less than two-thirds was collected, making an actual tax rate of less than five mills on the dollar (Ans., p. 16), without borrowing a dollar, issuing a bond, or creating a municipal debt (p. 78). The town was able to do this because it collected license taxes from liquor dealers, shows, peddlers, on dogs, and other sources, which sometimes exceeded the amounts collected from taxes on property.

2. The facts relied upon by the town to show that it is unable to pay the hydrant rentals only show that it is unwilling to pay them.

In 1891 it levied a municipal property tax of five mills on the dollar, of which $2,089.52 was collected, and $1,030.18 was not collected (Ans., p. 16).

In 1892 it levied a municipal property tax of eight mills on the dollar, of which $3,204.39 was collected, and $2,186.81 was not collected (Ans., p. 16).

In 1893, with an assessed valuation of $807,230, it levied a municipal property tax of six mills on the dollar, of which $2,718.83 was collected, and $2,124.55 was not collected (Ans., p. 16).

In 1894, finding that its citizens were unwilling to pay a six-mill tax, it reduced the assessed valuation to $650,620, and then levied a ten-mill tax for municipal purposes of which $3,616.52 was collected and $2,889.68 was not collected (Ans., p. 16).

A town which pays its current expenses during the panic of 1893 on a nominal tax-rate of about seven mills on the dollar, of which only about three-fifths is collected, without incurring a municipal debt (p. 78), is amply able to pay hydrant rentals for water furnished to it.

3. The answer does not allege that the town is unable to pay the stipulated hydrant rental.

(a) It merely alleges the total assessment for town purposes (of all the real and personal property within the corporate limits) during certain years, the town tax-rate assessed on real and personal property, the amount of municipal property taxes collected, and that "practically its entire revenue is derived from its tax "levy" (Ans., p. 16), but it does not allege either what taxes are included in its tax levy, the amount of licenses or occupation taxes it levies, or the amount of fees or fines that it collects.

(b) Although it appears that the town levies and collects licenses or occupation taxes, and collects fees and fines (Bill, pp. 5, 6, 7; Ordinance No. 59, p. 9; Ordinance No. 64, p. 11; Ordinance No. 65, p. 12; Ans., p. 14; Decision, p. 27; Certificate, p. 64), there is no allegation as to their amount.

(c) A plea by a town that its revenue is insufficient to discharge its obligations should set forth in detail

what its revenue consists of. A mere allegation that the revenue received from property taxes, two-fifths of which are not collected, is less than the amount of the town's obligations, is wholly insufficient. It may have other sources of revenue as is the case here.

Chicago vs. Wellman, 143 U. S., 339, 343–6.

(d) Towns in the South and Southwest derive a large part of their municipal revenue from licenses or occupation taxes.

Osborne v. Mobile, 16 Wall., 479, 481–2.
Machine Co. v. Gage, 100 U. S., 676–9.
Robbins v. Shelby Taxing District, 120 U. S., 501–2.
Postal Tel. Cable Co. v. Charleston, 153 U. S., 692, 694–9.
Emert v. Missouri, 156 U. S., 296.
Osborne v. Florida, 164 U. S., 650.

Moreover, in towns in the Southwest property is usually assessed for taxation at about a third of its market value (67 Supplement of the Commercial and Financial Chronicle, pp. 144, 117, 129, 176; Message of the Governor of New Mexico, Jany. 16, 1899, pp. 6, 9–10, 266–7). The mere fact, therefore, that the real and personal proprety in a New Mexican town is assessed at a certain sum, is only a part of the facts that must be known before its financial condition can be determined; there should also be allegations of the amount it collects from licenses or occupation taxes, fines and fees, and of the ratio between the assessed value and the market value of the property within the corporate limits.

4. In addition to taxes on real and personal property the town also levied and collected the following licenses or occupation taxes:

Dog license, each dog or whelp, per annum $2
" " bitch, per annum $5
Wholesale liquor license, per annum $50
Soda water, mineral water, ginger ale license, per annum $25
Gambling house or bowling alley license, each table or alley, per annum $100
Retail liquor license, per annum $200
Public hall license, per annum $60
Circus license, first performance $50
" each subsequent performance $25
Side show license, each performance $10
Theatrical performance, musical entertainment, concert, sleight of hand performance license, each performance $5
Dance, fandango or public ball license, each day .. $10
Peddler's license, per annum $200
Cart or wagon license, per annum $15
Shooting gallery license, per annum $50

The Revised Ordinances of the Town of Raton, adopted by the Board of Trustees, September, 1894, impose the following licenses or occupation taxes:

"ORDINANCE No. 1. CONCERNING DOGS."

"SECTION 1. That no dog, bitch or whelp shall be allowed to run at large within the limits of this town, unless the owner or keeper of such dog, bitch, or whelp shall before the 1st day of July, in each year, pay to the Town Recorder the sum of two dollars for every dog, or whelp, and the sum of five dollars for every bitch owned or kept by such person and shall also place around the neck of such dog, bitch or whelp a collar made of durable material."

"SECTION 3. It is hereby made the duty of all persons owning or keeping any dog, bitch or whelp on or before the first day of July in each year to apply to the Town Recorder and make payment to him as required in section one, (1) of this ordinance, together with a fee of fifty cents for issuing the same, and it shall

be the duty of such Recorder to issue a license to such owner or keeper with a tag bearing the license number, which tag shall, by the owner or keeper, be attached to and worn on the collar herein provided for, and the Recorder shall keep a record of such license and pay the amount received therefor over to the Town Treasurer, together with the Recorder's fee for issuing said license, taking his receipt therefor." * * * (Revised Ordinances, p. 11).

"ORDINANCE No. 2. Relating to the Licenses of Wholesale and Retail Liquor Dealers, Manufacturers of Soda Water, and Keepers of Gaming Tables."

"SECTION 1. Hereafter no person, firm or corporation shall be engaged in, or carry on any business, trade, occupation or do any act or thing hereinafter mentioned or described until he shall have obtained a license therefor in the manner hereinafter provided."

"SECTION 4. All licenses shall be signed by the Mayor and issued by the Recorder under his hand and the official seal of the Corporation, upon payment of a fee and the receipt of the sum assessed by this ordinance for such license.

"SECTION 5. The Recorder shall keep a License Register, in which he shall enter the name of each and every person licensed, the date of the license, the purpose for which granted, the amount paid therefor, and the date when the same will expire.

"SECTION 6. All money collected for licenses by the Recorder, shall be paid over to the Town Treasurer as soon as received, taking his receipt therefor."

"SECTION 11. Every person engaged in the trade, business or occupation of wholesale liquor dealer, brewer of malt liquors, or beer-bottling establishments, shall pay an annual license of fifty dollars, and such license shall authorize the person therein named to sell, barter, give away and deliver spirituous, vinous, fermented or malt and intoxicating liquors at the place or house specified in said license, in quantities not less than five gallons."

"SECTION 13. Any person who shall be engaged in the manufacture and sale of bottled soda water, pop, sarsaparilla, ginger ale, seltzer water, or other salt, soda or mineral water bottled, shall pay an annual license of twenty-five dollars."

"SECTION 15. Any person or persons who shall keep or permit the same to be kept within the corporate limits of the town of Raton, any gambling game, such as monte, faro, pass faro, roulette, poker, wheel of fortune, hazard, chuck-a-luck, craps, or any other game of chance played with cards, dice or other device, played for money or its equivalent, or bowling alley wherein other persons are permitted to play or throw balls or bowl for money, shall pay an annual license for each and every such table or alley kept by him the sum of one hundred dollars per annum, payable quarterly in advance."

"SECTION 17. Retail liquor dealers shall pay an annual license of two hundred dollars payable quarterly, and any person who shall keep any room or place in any building, hotel or elsewhere in said town, where any spirituous, vinous, fermented, malt or other intoxicating liquors are sold, provided or furnished to casual visitors, customers or frequenters, to be drank or used in such room or place, or on the premises, shall be deemed a retail liquor dealer within the meaning of this section."

"SECTION 20. There shall be paid for each license granted or issued under the provisions of this ordinance the sums stated respectively and said sum shall be paid to the Town Recorder, and no such license shall be issued or granted until the amount required to be paid therefor, together with a fee of fifty cents for issuing the same, shall have been paid to the Recorder." (Revised Ordinances, pp. 13–15).

"ORDINANCE No. 19. Concerning Licenses of Public Halls, Traveling Performances, &c."

SECTION 2. (As amended by Ordinance No. 33, passed May 29, 1893; published June 1, 1893.)

"Licenses may be granted to the owner, manager or conductor of each public hall or building upon payment of sixty dollars per annum, payable quarterly in advance, and no theatrical show or other performance given in said hall or building shall be required to pay any additional license." * * *

"SECTION 4. Licenses may be granted upon the payment to the Recorder of his fee and the amounts herein mentioned, for each circus, or circus and menagerie the sum of fifty dollars for the first and twenty-five dollars for each subsequent performance; for each side-show or traveling exhibition traveling with a circus or menagerie, for which an extra admittance is charged, for each performance the sum of ten dollars; for theatrical performances, musical entertainments, concerts, sleight-of-hand performances, plays by traveling performers, the sum of five dollars for each performance."

"SECTION 6. All persons who allow in their houses or upon premises under their control any dance, fandango or public ball without first having obtained a license therefor as hereinafter provided shall be punished by a fine of not less than ten dollars and not more than twenty-five dollars or be imprisoned in the town prison for a period not to exceed thirty days or by both such fine and imprisonment in the discretion of the court trying the same; provided, however, that the Mayor, in his discretion, may if he see fit, grant permission for holding said dance, ball or fandango and remit or waive the license herein required.

"SECTION 7. Licenses may be granted by the Recorder and shall be signed by the Mayor and under the seal of the town and shall be issued upon payment to the Recorder of his fee and the amounts herein mentioned for each day or night on which such dance, ball or fandango is held, the sum of ten dollars" (Revised Ordinances, pp. 43–4, 64).

"ORDINANCE NO. 35. TO AMEND ORDINANCE NO. 9, RELATING TO PEDDLERS."

"SECTION 1. Any person or persons who shall temporarily bring into the town of Raton goods, wares or other class of merchandise and shall offer the same for sale at public auction, or at retail, or at private sale, and all persons who shall sell or offer for sale any goods, wares, or merchandise at retail by sample, shall pay an annual license of the sum of Two Hundred Dollars; payable quarterly in advance; provided, that nothing in this section shall be construed as to require a license for persons peddling milk, fruit, vegetables or other articles of farm produce" (Revised Ordinances, p. 65).

"ORDINANCE NO. 54. AMENDING AND REPEALING PORTIONS OF ORDINANCES NO. 37 AND 50."

SECTION 1. That any person or persons who shall run, use or keep any coal wagons, ice wagons, water wagons, express wagon, stone wagon, oil wagons and drays used in transferring goods, wares and merchandise or any other movable property to or from the railroad or from place to place within the town limits, or delivering coal, ice or water, express, or oil, or stone as used in the construction of buildings or any other use, shall pay an annual license of fifteen dollars, payable quarterly in advance, and every licensed coal wagon, ice wagon, water wagon, express wagon, oil wagon, stone wagon and dray shall have affixed on each side of said wagon or dray as aforesaid the number thereof in plain, conspicuous figures, and any person who shall run, use or keep for hire any coal wagon, ice wagon, water wagon, express wagon, oil wagon, stone wagon or dray without having the same numbered and having obtained a license as aforesaid, shall upon conviction thereof be punished by a fine of not less than five dollars nor more than twenty-five dollars or by imprisonment in the town prison or county jail for not less than five days nor more than ten days or by both said fine and imprisonment in the discretion of the court trying the case.

"SECTION 2. Any person who shall keep or allow to be kept on his premises within the Town of Raton any shooting gallery shall pay an annual license of fifty dollars, payable in advance, and any person who shall keep or allow any shooting gallery to be kept on his premises without first having obtained a license as aforesaid, shall upon conviction thereof, be punished by a fine of not less than ten dollars nor more than fifty dollars, or by imprisonment in the town prison or county jail for not less than ten nor more than twenty days, or by both such fine and imprisonment in the discretion of the court trying the case."

Revised Ordinances, p. 81.

The annual reports of the town trustees show that the amount of licenses collected nearly equals, and occasionally exceeds, the amount of property taxes collected.

The following reports of the Town Trustees for the years ending April 1, 1892, and April 1, 1893, were printed in the official town paper ("The Raton Range") for May 6, 1892, and April 6, 1893:

ANNUAL REPORT OF THE TOWN TRUSTEES OF RATON, for the fiscal year ending April 1st, 1892.

REVENUE.

Licenses, Retail Liquor	$1,750 00
" Wholesale Liquor and Soda Bottling	75 00
" Gambling	850 00
" Shows, Peddlers, etc.	112 50
" Dog	114 00
Total amount Licenses	$2,901 50
Taxes collected and paid over	2,089 52
Taxes, road	46 00
Fines and J. P. Courts	91 85
Total receipts	$5,128 87
Tax uncollected about	$935 38

DISBURSEMENTS.

Vouchers Issued	$3,515 57	
Vouchers returned paid		$3,483 07

SALARIES.

Recorder	$225 00
Marshals	700 00
Deputy Marshals	524 00
Attorney's Salary and Fees	190 00
Treasurers	100 00
Physicians	225 00
Total amount of Salaries	$1,964 00

DISBURSEMENTS.

Street Improvements and Bridges	$483 09
Street cleaning and Garbage removal	367 85
Feeding and working Prisoners and Jail expense	132 95
Hardware and Implements	103 00
Killing Dogs	67 75
Printing	120 18
Furniture and Stationery	28 25
Rent, Fuel and Lights	101 50
Translations	9 00
Election	9 00
Charity	57 75
Tax Rebate	9 80
Pound Expense	1 50
Coroner's Fee	60 00
Total Disbursements	$3,515 57

WM. TINDALL,
Mayor.

Attest :
H. W. CARR,
Recorder.

ANNUAL REPORT

OF THE

TOWN TRUSTEES OF RATON,

For the Fiscal Year Ending April 1st, 1893.

REVENUE.

Licenses, Retail Liquor	$1,550.00
" Wholesale liquor, Bottling	75.00
" Gambling	787.50
" Dog	52.00
" Shows, Dance, Peddlers, &c	400.00
Total amount Licenses	$2,864.50
Taxes collected and paid over	3,979.90
Taxes, Road	360.00
Fines and J. P. Courts	207.00
Total Receipts	$7,411.40
Balance cash on hand April 1, 1892	1,499.48
Total receipts and cash to date	$8,910.88
Taxes uncollected about	2,000.00

DISBURSEMENTS.

Vouchers issued during fiscal year	$7,867.66
Vouchers returned paid during fiscal year	8,011.99
Total amount of salaries	2,125.61
For streets, bridges and crossings	1,726.44
Sewers and sidewalks	195.67
Garbage removed	631.50
Water contract	1,925.00
Election expenses	35.50
Street and office lights	473.00
Office rent, furniture, stationery, etc	418.52
Miscellaneous	336.42
Total disbursements	$7,867.66

JOHN JELFS,
Acting Mayor.

C. D. STEVENS,
Acting Recorder.

Dated, April 3, 1893.

IV. The Territorial Supreme Court decided that the part of ordinance No. 10 containing the town's agreement to pay the hydrant rental is null and void; that ordinance No. 59, making an appropriation to pay the hydrant rental is null and void; that the warrants issued to pay the back hydrant rental are null and void, and that ordinance No. 64, which repeals the appropriation contained in ordinance No. 59, is valid and effectual (Certificate, p. 66). This decision of the highest territorial court shows that it is idle to claim that "The appellant has a plain, speedy and "adequate remedy at law" (Appellee's brief, p. 27), or that the appellant has any practical remedy at law in any court of New Mexico (Appellee's brief, pp. 25–39).

The appellee makes the extraordinary claim that the certificate made by the Territorial Supreme Court that it had decided these questions as stated above (p. 66) is "erroneous" and "incorrect" (Appellee's brief, pp. 25, 30).

This assertion comes with little grace from the appellee's counsel, inasmuch as he was a Justice of the Territorial Supreme Court at the time the case was decided and the certificate was made (p. 50) and he did not dissent therefrom, although he took part in the decision of the case (p. 50).

This certificate was made by the Territorial Supreme Court (pp. 55–78) in conformity with 18 U. S. Stat. at Large, p. 28. Such a certificate is as final and conclusive as a judgment of the Territorial Supreme Court is.

Respectfully submitted,

HENRY A. FORSTER,
For Appellant.